Court, U.S.
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No. 96-92

In The

Supreme Court of the United States

October Term, 1995

HENRY WOLF,

Petitioner,

v.

BUSS (AMERICA) INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner's Question Presented misstates the facts that were at issue before the lower courts. In response to Respondent's motion for summary judgment, Petitioner failed to produce evidence that the majority of the reasons offered by Respondent for Petitioner's termination were "untrue." Rather, Petitioner admitted to two of the proffered reasons and denied four of the proffered reasons. Petitioner also disputed the importance of the proffered reasons. While Petitioner raised an issue of material fact as to the four individual proffered reasons that he denied, as a matter of law, his denials were insufficient to taint the two admitted reasons.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Buss (America) Inc., respectfully prays that the Court deny a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 16, 1996.

OPINIONS BELOW

Petitioner's statement of the opinions below, and appended to his Petition, is complete and correct.

JURISDICTION

Petitioner's statement of jurisdiction is complete and correct.

STATUTORY PROVISIONS INVOLVED

Petitioner's statement of statutory provisions involved is complete and correct.

STATEMENT

This case involves an employer's business decision to terminate one of its three service engineers; which termination was made as part of an economically dictated

reduction in force. (Petitioner's Appendix at page 2, hereinafter "App.") Petitioner was an at-will employee subject to termination with or without cause, as long as age was not a consideration. Petitioner brought an action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., alleging that he was terminated because of his age.

Petitioner was hired by Respondent when he was age 50 (App. 2) and was terminated by Respondent when he was age 53. (App. 2) The two service engineers retained by Respondent were ages 34 and 51. (App. 2)

Petitioner admits to the necessity and legitimacy of the reduction in force (App. 36), but disputes the reasons offered by the Respondent for selecting him for termination. (App. 36) Petitioner produced no evidence that the reasons asserted by Respondent for his termination were concocted. Instead, Petitioner disputed the reasons by variously denying their significance or denying that he engaged in the alleged behavior.

Petitioner states that his employer found that his performance was "admirable." (Petitioner's Petition at page 2, hereinafter "Pet.") However, this reference is to his performance while employed by Buss AG of Basel, Switzerland, not by the Respondent, Buss (America) Inc., hereinafter sometimes referred to as "employer" and sometimes as "Respondent". (App. 2) Petitioner also refers to the bonus he received prior to his termination for "exceptional contributions to the company." (Pet. 2) However, Petitioner fails to note that everyone in the company received a bonus at that time. His bonus was not based on his individual performance.

Petitioner produced no evidence that his work performance was superior to that of either of the two retained service engineers. (App. 39-40) Neither did Petitioner produce any evidence that the work performance of either of the two service engineers retained by the Respondent were inferior to his. (App. 39-40)

The courts below have held that the employer's two uncontradicted bases for its business decision were sufficient to permit employer to prevail upon its motion for summary judgment and that the Petitioner's denial of four other bases relied upon by the employer, did not taint or render fishy the employer's two remaining independent, non-discriminatory reasons.

Summary Judgment Ruling

While Petitioner disputed four of the employer's reasons by either denying that he engaged in the alleged behavior or disputing the significance of the reasons, Petitioner admitted to two of the reasons. For purposes of a summary judgment motion, only the four challenged reasons were rebutted.

In entering summary judgment in favor of Respondent, the District Court applied the law as set forth in *McDonnell-Douglas, Burdine* and *Hicks. McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 247 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Hicks did not alter the analytical framework developed in *McDonnell-Douglas* and *Burdine*, wherein once the plaintiff establishes a prima facie case, the defendant then

can offer legitimate non-discriminatory reasons for its action. Once the defendant does so, the burden of production shifts back to the plaintiff to produce evidence of pretext. Plaintiff's failure to produce evidence of pretext will permit summary judgment for the defendant.

Ruling on Appeal

The majority panel of the Appeals Court affirmed the District Court's order of summary judgment.

In its opinion, the Appeals Court recognized that the reduction in force required the Respondent to evaluate the performance of its three service engineers and that the several reasons offered by the Respondent for choosing to terminate Petitioner were not fishy nor intertwined. Further, the Appeals Court found the two unchallenged reasons to be independent, non-discriminatory and untainted.

Petitioner's performance history and personality made him, in his employer's judgment, the least desirable of the three service engineers. As an at-will employee, a person in the protected class can be terminated for any reason or no reason, as long as the termination is not based upon his or her age.

In her dissent, Judge Rovner, argues that because (1) four of the six reasons proffered by the employer for its decision to terminate the petitioner were successfully denied for purposes of the motion for summary judgment and (2) another reason, though unchallenged, was "preposterous", the remaining reason, also unchallenged, was

not adequate to sustain the motion for summary judgment.

Judge Rovner argued that finding fault with a twenty-four hour a day, seven day-a-week, on-call service engineer's refusal to install a home telephone was "preposterous."

Judge Rovner was further of the opinion that this case should go to a jury, because Respondent's reasons for choosing to terminate Petitioner were offered by a sole witness: Petitioner's supervisor, notwithstanding the rebuttal was offered by a sole witness as well: the Petitioner.

Petitioner filed a Petition for Rehearing *en banc*, which was denied by a vote of eight to four.

REASONS FOR DENYING PETITIONER'S WRIT

The decision of the Court of Appeals is consistent with this Court's holding in *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Petitioner misstates the holding in *Hicks*. *Hicks* did not hold that a trier of fact can infer pretext from the falsity of the proffered reasons. *Hicks* holds that a trier of fact's finding of pretext does not mandate judgment for the plaintiff as a matter of law. *Hicks* states that in order to prevail in a "mixed motive" discrimination case, (1) the plaintiff must show pretext and (2) the trier of fact must be persuaded that actual discrimination occurred. *Hicks*, citing *United States Postal Service Bd. of Governors v. Aiken*, 460 U.S. 711, 716 (1983).

In this case, Petitioner never gets to the situation contemplated in *Hicks*, because Petitioner fails to offer evidence that Respondent's reasons were pretextual. As pointed out, *supra*, *Hicks* does not alter the burden shifting framework of *McDonnell-Douglas* and *Burdine*.

Contrary to Petitioner's assertion, there is no inconsistency among the Circuits as to the issues raised in this case. The Seventh Circuit Court of Appeals permits a plaintiff to show pretext without rebutting each of several reasons proffered by a defendant. In some cases the employer's reasons are so intertwined and so fishy and suspicious, the pretextual character of one can taint the others. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir. 1995).

The Seventh Circuit standard for allowing the pretextual character of one reason to taint another appears to be consistent with the decisions of the other Circuit Courts of Appeal cited by Petitioner.

In *Fuentes v. Pirskie*, 32 F.3d 759, 765 (3rd Cir. 1994), the court stated that in some instances some of the proffered reasons may be so weak, implausible or contradictory that a reasonable finder of fact could rationally find all reasons unworthy of credence. In *Roebuck v. Drexel*, 852 F.2d 715 (3rd Cir. 1988), the court found that the plaintiff produced evidence of discrimination in one of the faculty evaluator's opinions, upon which subsequent opinions were based. Thus, a tainting of the other opinions was possible. In *Louis v. Board of Ed. of City of New York*, 705 F.Supp. 751 (E.D.N.Y. 1989), the court held that the employer's reasons could become so riddled with

error that an employer could not honestly have relied upon them.

In two of the cases cited by Petitioner in support of his position, the courts make forceful statements challenging the reasonableness of allowing one pretextual reason to taint another. In *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 600 (9th Cir. 1993), the court stated that the falsity of one reason sheds little light on the truthfulness of the other. The court in *Sims v. Cleland,* 813 F.2d 790, 798 (6th Cir. 1987) noted that the falsity or incorrectness of one reason may not impeach another.

In the case at bar, the Seventh Circuit Court of Appeals determined that the reasons offered by Respondent for Petitioner's termination were neither fishy nor suspicious when coupled with an undisputed economic downturn. Respondent terminated an at-will employee and offered several legitimate non-discriminatory reasons, two of which Petitioner could not challenge. Summary judgment was appropriate under the Seventh Circuit's standard, which is no different than that of the other circuits.

Petitioner's argument is nothing more than Petitioner's "disagreement" with the Respondent's decision. Petitioner ultimately failed to produce any evidence that the Respondent was untruthful in stating its reasons for his termination. If an inference of discrimination can be created by the Petitioner's uncorroborated denials and his disagreement with the wisdom of his employer's decision, then at-will employment will cease to exist and all subjective employment decisions involving older

employees would be subject to a jury trial under the ADEA.

CONCLUSION

The Petition For Writ Of Certiorari should be denied.

August 1996.

Respectfully submitted,

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